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No. 87-1672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEE SECK MON, DELIA CHAN WAI SHEUNG, AND FAMOUS HORSE GARMENT FACTORY, LTD.,
Petitioners,
vs.
GUESS?, INC., GEORGES MARCIANO, MAURICE MARCIANO, ARMAND MARCIANO AND PAUL MARCIANO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California Supreme Court's summary denial of a Petition for Review of the California Court of Appeal's summary denial of a Petition for Writ of Prohibition and/or Writ of Mandate taken from the Superior Court's denial of Petitioners' Motion for Judgment on the Pleadings is a final state court judgment to which the Court's jurisdiction extends.

2. Whether, given the lack of conflict among the Circuits, this Court should exercise its discretion to review a ruling of the Superior Court of the State of California, which held that the Copyright Act of 1976 does not preempt Respondents' claims that Petitioners and others breached their fiduciary duties to Respondents and otherwise engaged in conduct actionable under California law by misappropriating, for use in competing ventures owned and controlled by Petitioners and others, confidential, trade secret apparel designs that are outside the subject matter of copyright.

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GUESS?, INC., GEORGES MARCIANO, MAURICE MARCIANO, ARMAND MARCIANO AND PAUL MARCIANO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves nothing more than an attempt to obtain premature appellate review of a pre-trial ruling made by the California Superior Court. The decision of that court is not final and, accordingly, under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975), certiorari is inappropriate. Moreover, no conflict among the Circuits exists which would justify granting the petition. This lack of conflict is not surprising, since it is settled that preemption does not apply to cases, such as this one, which

involve claims for breach of fiduciary duty and wrongful misappropriation of trade secrets.

Respondent Guess?, Inc. ("Guess") is a high fashion sportswear company founded in 1981 by Respondents Georges Marciano, Maurice Marciano, Armand Marciano and Paul Marciano. (App. 3, 8.) In July 1983, Joe Nakash, Avi Nakash and Ralph Nakash, owners of Jordache Enterprises, Inc. ("Jordache") and related companies, purchased an interest in Guess and at present are the record owners of fifty percent (50%) of the outstanding shares of Guess stock. (App. 3, 10-12.) Petitioners are, and at all times pertinent to the instant petition were, Jordache's principal manufacturers. (App. 5-7, 13.)

Beginning prior to the Nakash stock purchase, competing garment companies have copied or "knocked-off" successful, innovative Guess designs, styles or fabric configurations, to which copyright protection in the United States does not extend. (App. 12-13.) Prior to the Nakash stock purchase, the Marcianos formed GM Gasoline, Inc. to produce "knock-offs" of successful Guess styles for sale under the Gasoline label at prices lower than those of Guess and in competition with other garment manufacturers that were "knocking-off" Guess designs. (App. 13.) Through this marketing strategy Gasoline would have a distinct time and quality advantage over its competitors in the Guess "knock-off" market by virtue of its direct access to confidential, proprietary Guess patterns, markers and specifications, and the Marcianos could earn profits from "knock-offs" without diminishing the Guess mark. *Id.*

At the time of the Nakash stock purchase, GM Gasoline, Inc. was made a division of Guess called the Gasoline Division. *Id.* Shortly thereafter, at the Nakashes' insistence, the day-to-day management of the Gasoline Division was taken over by the Nakashes, and production of Gasoline garments was transferred to Petitioners in Hong Kong. *Id.*

Subsequently, again at the insistence of the Nakashes, Gasoline, Ltd., a separate Delaware corporation, owned fifty percent (50%) by the Marcianos and fifty percent (50%) by the Nakashes and operated by the Nakashes, was formed in August 1984 and assumed the operations of the Gasoline Division of Guess. (App. 14.)

Pursuant to the Gasoline marketing strategy, Guess communicated confidential, proprietary Guess information to the Nakashes and Petitioners in trust to be used solely for the production of Gasoline garments. (App. 14.) This confidential, proprietary Guess information included styles, fabrics, designs, patterns, markers, sales information, and processing and manufacturing techniques used for Guess garments. *Id.* The Nakashes and Petitioners breached this trust by improperly misappropriating such confidential, proprietary Guess information for use in production of garments in competition with Guess and Gasoline under the Jordache label and other labels of garment companies owned or controlled by the Nakashes. (App. 20-21.)

Based on the above and other facts, Respondents filed this action in the Superior Court of the State of California against Petitioners, the Nakashes, Jordache and related entities, and others alleging, in pertinent part, fraud, breaches of fiduciary duties, misappropriation of confidential proprietary information, unfair competition, trademark infringement, anti-competitive activity and civil RICO violations. (App. 1.)

Petitioners filed a Motion for Judgment on the Pleadings in the trial court contending that state court jurisdiction over specified claims relating to "knock-offs" or copies was preempted under the Copyright Act of 1976, specifically 17 U.S.C. § 301. (App. 219-302.) The trial court denied Petitioners' motion on the grounds that the gravamen of Respondents' action, as it relates to that motion and the instant petition, is that Petitioners and other defendants

misused Guess proprietary information in breach of fiduciary obligations, that such conduct is tortious under California law, and that California court jurisdiction over such claims is not preempted by federal law. (App. 1021.) Petitioners' petition to the California Court of Appeal for a Writ of Prohibition and/or Writ of Mandate was summarily denied, as was their Petition for Review to the California Supreme Court.

SUMMARY OF ARGUMENT

1. The Court's jurisdiction to review state court decisions extends only to final judgments. The trial court's denial of Petitioners' Motion for Judgment on the Pleadings and the summary denials by the California Court of Appeal and the California Supreme Court of Petitioners' petitions for review do not constitute a final judgment for jurisdictional purposes. Other federal issues will be involved in subsequent state court proceedings regardless of the Court's disposition of the instant petition, and reversal of the trial court's ruling would not preclude further state court litigation of the same facts.

2. Petitioners cite no conflict among the Circuit Courts which would warrant certiorari. In fact, two independent grounds support the trial court's holding that preemption is inapplicable, and Petitioners do not suggest that either of these grounds has evoked any conflict among state or federal courts.

3. Under Section 301 of the Copyright Act, only laws which affect "works that . . . come within the subject matter of Copyright" are preempted. In the present case, Petitioners' claim of preemption is fundamentally flawed because the materials at issue — apparel designs — are outside the subject matter of copyright.

4. Contrary to the impression left by Petitioners, this is not a case of mere copying. In fact, the gravamen of the complaint is the wrongful misappropriation of trade secret apparel designs in breach of a fiduciary duty. Here, Petitioners conspired with fiduciaries of Respondent Guess and obtained confidential proprietary information (including styles, fabrics, designs, markers and sales data) from Guess, in trust, with the understanding that this information would be used to produce merchandise for sale by a Guess division or affiliate only. Instead, Petitioners misappropriated this information and used it to produce garments for sale by companies which Petitioners owned separately and which compete with Guess.

It is settled that copying is actionable under state law in those cases (such as this one) where the plaintiff alleges an "extra element", in addition to copying, such as the breach of fiduciary duty or the wrongful misappropriation of a trade secret. This authority, in fact, is so uniform that Petitioners cite no conflict among the Circuit Courts of Appeals, among state courts, or between state and federal courts which would warrant certiorari.

ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

THE COURT'S JURISDICTION TO REVIEW STATE COURT DECISIONS EXTENDS ONLY TO FINAL JUDGMENTS.

Petitioners seek review, pursuant to 28 U.S.C. § 1257(3), of the trial court's rejection of Petitioners' federal preemption arguments and denial of Petitioners' Motion for Judgment on the Pleadings based thereon. Petitioners'

petitions for review to the California Court of Appeal and California Supreme Court were both summarily denied.

Petitioners' motion was directed to only four of nine causes of action stated against one or more of the Petitioners in Respondents' Fifth Amended Complaint.[1] The evidence of Petitioners' conduct to be presented at trial[2] will be substantially the same as to all of the causes of action in which Petitioners are named. Moreover, at least two of the five unchallenged causes of action against Petitioners, alleging trademark infringement and civil RICO violations, involve federal issues that will survive regardless of the Court's disposition of the instant petition.

The Court's jurisdiction to review state court decisions is generally limited to "[f]inal judgments or decrees rendered by the highest court of the State in which a decision could be had." 28 U.S.C. § 1257. The final judgment rule has been interpreted as requiring that, to be reviewable, the state court judgment "be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of that litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v.*

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[1] One or more of the Petitioners are named in the following causes of action in the Fifth Amended Complaint: Fifth Cause of Action (Fraud); Sixth Cause of Action (Breach of Fiduciary Duty); Seventh Cause of Action (Misappropriation of Confidential Proprietary Information); Eighth Cause of Action (Unfair Competition); Twelfth Cause of Action (Trademark Infringement); Fourteenth Cause of Action (Accounting); Fifteenth Cause of Action (Violation of the Cartwright Act); Nineteenth Cause of Action (Violations of 18 U.S.C. § 1962(d)); and Twentieth Cause of Action (Injunctive Relief). (App. 1-80.) Petitioners contended that only the Sixth, Seventh, Eighth and Fourteenth Causes of Action were preempted under federal law. (App. 219-272.)

[2] As of the date of the filing of this Brief in Opposition, no trial date had been set in this action.

Railroad Commission, 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770 (1945). Here the state court decision of which review is sought is not "the final word of a final court" but merely an interlocutory decision to which the Court's jurisdiction does not extend.

Although the Court in certain exceptional circumstances, described and categorized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-485, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975), has treated state court judgments as final for jurisdictional purposes even though further state court proceedings were anticipated, the Court in *Cox* observed that in most, if not all, of the cases falling within the *Cox* exceptions, no other federal issues would remain to be resolved in the state court proceedings once this Court disposed of the federal issues presented and thus there would be no probability of piecemeal review of federal issues. *Id.* at 477. *Accord, Flynt v. Ohio*, 451 U.S. 619, 621, 68 L.Ed.2d 489, 101 S.Ct. 1958 (1981). Here, other federal issues will remain to be resolved in the trial court regardless of the Court's disposition of the preemption issue, and the probability of piecemeal review of the federal issues raised in the state court action will be avoided only by denial of the instant petition.

Moreover, none of the four *Cox* exceptions is applicable to this case. Therefore, the state court judgment of which Petitioners seek review is not final, and the Court is thus without jurisdiction to grant the instant petition.

II.

THE ABSENCE OF ANY CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REFLECTS THE LACK OF MERIT IN PETITIONERS' PREEMPTION ARGUMENT

In addition to the procedural reasons set forth above, the petition must be denied because Petitioners have shown no conflict among the Circuit Courts of Appeals which would warrant certiorari.[3] This absence of conflict is not surprising, since, as we now show, two *independent* grounds support the trial court's holding that preemption is inapplicable.

1. Preemption is Inapplicable in the Present Case Because the Materials Copied by Petitioners — Apparel Designs — Are Outside the Subject Matter of Copyright.

A fundamental flaw in Petitioners' argument is the assumption that preemption applies to laws involving apparel designs. In fact, under Section 301 of the Act, only laws which affect "works that . . . come within the subject matter of copyright" are preempted. 17 U.S.C. § 301.

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[3] Similarly, there is no conflict among the highest courts of the states on this issue. California appellate courts have dealt with cases similar to this one and have concluded that preemption is not applicable. *Sammons & Son v. Ladd-Fab., Inc.*, 138 Cal.App.3d 306, 309-312 (1982) ("The point of both *Winston* and *Kewanee* is that the copying was not 'mere copying.' It was copying carried on in an illegitimate fashion, *i.e.*, in violation of defendants' fiduciary duties" *Id.* at 312). Petitioners cite no state cases which which reach the opposite conclusion. Accordingly, under Rule 17, *Supreme Court Rules*, certiorari is not warranted.

Petitioners admit that apparel designs are not copyrightable. (Petition, pp. 7-8.) Nevertheless, Petitioners assume, without citing any authority, that apparel designs come "within the subject matter of copyright" so as to warrant preemption. In fact, they do not.

The subject matter of copyright is set forth in Section 102 of the Act and includes "pictorial, graphic and sculptural" works. 17 U.S.C. § 102. As Professor Nimmer notes, however, the term "pictorial, graphic and sculptural works" is defined to *exclude* "useful articles" such as apparel designs. 17 U.S.C. § 101; 1 *Nimmer on Copyright* (perm. ed. rev. 1987) § 2.08[H][3], pp. 2-125-126. Accordingly, apparel designs are excluded from the subject matter of copyright and preemption is not applicable to state laws regulating such designs. *See, Nimmer on Copyright, supra,* § 2.08[H][3] n.293 ("[T]he limitation relating to designs for useful articles is stated as an *exclusion* from the *subject matter* of Section 102, and not as a limitation of rights under Section 106" (emphasis added)). Because such apparel designs are outside the subject matter of copyright, no preemption is applicable in this case, and the petition should be denied.

2. State Law Torts are Preempted Only Insofar as They Permit Claims Based Solely on Copying. Where, as Here, an "Extra Element" is Alleged in Addition to Copying, No Preemption Will Lie.

Building on the faulty premise that preemption applies to apparel designs, Petitioners next argue that any claim which involves the copying of such designs is preempted. The petition, however, fails to cite any case (state or federal) which adopts this broad view of preemption. In fact, it is well established that, where a state cause of action requires

an "extra element" in addition to copying, no preemption will lie:

> If under state law the act of reproduction, performance, distribution or display, . . . will *in itself* infringe the state created right, then such right is preempted. But if *other elements* are required, *in addition to* or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie "within the general scope of copyright," and there is no preemption.

1 *Nimmer on Copyright*, *supra* [B][1] p. 1-12 § 1.01 (emphasis added).

The "extra element" test has been recognized by state and federal courts, which hold that there is no preemption in cases where a defendant, in obtaining material to be copied, breaches a separate legal or contractual duty to the plaintiff. *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984); *Mayer v. Josiah Wedgewood & Sons, Ltd.*, 601 F.Supp. 1523, 1535 (S.D.N.Y. 1985); *Sammons & Son v. Ladd-Fab., Inc.*, 138 Cal.App.3d 309-312 (1982).

Such a breach of duty is present here. This is not a case where strangers to Guess walked into a clothing store, bought Guess garments, and copied them. On the contrary, here the Nakashes were directors of Guess and, under California law, owed it a fiduciary duty. *Remillard Brick Co. v. Remillard-Dandini*, 109 Cal.App.2d 405 (1952). Based on this relationship of trust, Petitioners, who acted in concert with the Nakashes, requested and received confidential, proprietary information belonging to Guess. This information was delivered to Petitioners in confidence and was to be used solely to produce garments for the benefit of Guess. Petitioners and the Nakashes, however,

conspired to use this confidential, proprietary information to benefit companies which they owned separately, and which, in fact, were competitors of Guess. As we now show, it is settled that such (i) misappropriation of confidential trade information and (ii) breach of fiduciary duty each provide the "extra element" which makes preemption inapplicable.

a. It is settled that the "extra element" test is satisfied by allegations of wrongful misappropriation of confidential trade information.

The complaint alleges that the Petitioners conspired to usurp confidential information belonging to Guess in spite of a legal and equitable duty to use this secret information only for the benefit of Guess. It is settled that state laws which prohibit such wrongful taking of trade secret information are not subject to preemption. Thus, in *Kewanee Oil Co. v. Bicron Corporation*, 416 U.S. 470, 40 L.Ed.2d 315, 96 S.Ct. 1879 (1974), this Court held that federal patent law does not preempt state laws protecting trade secrets. In *Kewanee*, the plaintiff developed a secret process for growing large, industrial crystals. Several key employees left plaintiff's employ, started a new company, and shortly thereafter began to manufacture crystals the same size as plaintiff's. Subsequently, the plaintiff sued for wrongful misappropriation of trade secrets and prevailed at trial.

On appeal to this Court, the defendants argued that the process was a proper subject for federal statutory protection (in that case, patent) and, thus, the exclusive remedy was under the patent laws. However, because the process had been in commercial use for more than a year and plaintiff had not sought a patent, a patent could not be obtained.

Thus, it was argued (as Petitioners argue here) that plaintiff had no remedy.

This Court disagreed:

> We hold that Iowa's law of trade secrets is not preempted by the patent laws of the United States . . .
>
> * * *
>
> The protection accorded the trade secret holder is against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse. The law also protects the holder of a trade secret against disclosure or use when the knowledge is gained, not by the owner's volition, but by some "improper means," Restatement of Torts § 757(a), which may include theft, wiretapping, or even aerial reconnaissance. A trade secret law, however, does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture.
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> * * *
>
> States may hold diverse viewpoints in protecting the intellectual property relating to invention as they do in protecting intellectual property relating to the subject matter of copyright. The only limitation on the States is that in regulating the area of patents and copyrights they do not conflict with the operation of the laws in this area passed by Congress . . . .

Kewanee, supra, 416 U.S. at 474-479.

This is not a case where Petitioners divined Guess' trade secrets by "reverse engineering." On the contrary, Petitioners obtained proprietary information from Guess in trust with the understanding that this information would be kept secret and used only for the benefit of Guess. Under *Kewanee,* there is no preemption of Guess' state law right to be protected against what this Court has described as "unauthorized use of the trade secrets by those to whom the secret has been confided under the express or implied restriction of non-disclosure or non-use." *Id.*

b. The "extra element" test is also satisfied by allegations of breach of fiduciary duty.

Contrary to the impression left by the petition, it is well recognized that a breach of fiduciary duty or a breach of trust will provide the "extra element" necessary to avoid preemption.

This conclusion is compelled by the language of Congress itself. Specifically, the House Report on the Copyright Bill states:

> The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a *breach of trust or confidentiality,* that are different in kind from copyright infringement.

House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Congress, 2nd Sess. (1976) (emphasis added).

Here, such a breach of trust is the gravamen of Guess' complaint against Petitioners. In light of this clear expression of Congressional intent, it is not surprising that

courts have specifically held that actions for copying which also involve a breach of fiduciary duty are not preempted.

Thus, in *Oddo v. Ries, supra*, 743 F.2d 630, a Ninth Circuit case which Petitioners fail to cite, plaintiffs and defendants formed a partnership to publish a book on auto repair. The plaintiff completed a manuscript of the book and gave it to the defendant who was to arrange publication. The defendant, however, was not satisfied with the manuscript and hired another writer to revise it. The defendant then arranged publication of the other writer's finished product, which incorporated a significant amount of the plaintiff's manuscript. The plaintiff sued for copyright infringement and for defendant's breach of his fiduciary duties as the plaintiff's partner. The trial court awarded plaintiff damages on both claims, and the defendant appealed, claiming (as Petitioners do here) that the claims for breach of fiduciary duty were preempted. The Ninth Circuit's response was unequivocal:

> Oddo also claims that Ries breached the fiduciary duty that Ries owed Oddo as a partner. Because a partner's duty to his co-partner is quite different from the interests protected by copyright, this cause of action is also not preempted.

Id. 743 F.2d at 634.

Petitioners ignore this dispositive Ninth Circuit case and rely instead on a strained reading of *Del Madera Properties v. Rhodes and Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987). The *Del Madera* case, however, does not purport to reverse the Ninth Circuit authority, quoted above, which holds that actions for breach of fiduciary duty are not preempted by the copyright law; nor does it challenge the language in the House Report which specifically allows state suits for copying in those cases which contain the added element of a breach of trust. In fact, the *Del Madera* case is completely

irrelevant to the present situation, because no fiduciary duty was found to exist in *Del Madera*. As the *Del Madera* court noted:

> Defendants, however, were never in a fiduciary relationship with Del Madera. McCart may have been, but she is not a party to this action. Since the defendants were not in a fiduciary relationship with Del Madera, they did not breach a fiduciary duty owed to Del Madera.

Id. 820 F.2d at 978. The decision by the Superior Court in this case was thus in accord with the law of preemption as recognized by the Ninth Circuit.[4]

Significantly, Petitioners have not shown that there is any conflict among the Circuit Courts of Appeals on this point. In fact, they cite no cases by any federal courts holding that an action for breach of a fiduciary duty is preempted. (While Petitioners do cite several cases involving mere copying, where no extra element is present, none of these cases applies preemption to claims involving a breach of fiduciary duty.) Accordingly, certiorari is not warranted.

c. This Court has recognized strong policy considerations against preemption in cases such as the one at bar.

Petitioners ignore the well-recognized policy considerations against preemption in cases such as this one. It is

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[4] The work that defendants in *Del Madera* allegedly misappropriated was a map which had been copyrighted by plaintiff. Unlike the apparel designs at issue here, maps come within the subject matter of copyright (17 U.S.C. § 101) and are therefore subject to preemption. The instant case is thus further distinguishable from *Del Madera* because, as shown in Section 1 above, there is no preemption where apparel designs are at issue.

important to keep in mind that Petitioners' argument, if accepted, would completely immunize Petitioners and the Nakashes for their breach of duty to Guess. (According to this argument, the Petitioners have no copyright liability to Guess because the apparel designs which they usurped are not subject to copyright, and they have no liability under state law because all claims for breach of fiduciary duty and misappropriation of trade secrets are preempted.) This Court and other federal courts, however, have recognized two strong policy considerations against granting such across-the-board immunity to defendants, such as Petitioners here, who are accused of usurping trade secrets in breach of a fiduciary duty.

First, the free flow of commerce requires that businesses be able to entrust secret, proprietary information to their fiduciaries without fear that the fiduciaries will use the information for their own personal benefit and to the detriment of the corporation.

In fact, both this Court and Circuit Courts have recognized that preemption of laws protecting trade secrets would have a chilling effect on commerce. *Kenawee Oil Co. v. Bicron Corporation, supra,* 416 U.S. at 487 ("The detrimental misallocation of resources and economic waste that would thus take place if trade secret protection were abolished with respect to employees or licensees cannot be justified by reference to any policy that the federal patent law seeks to advance."); *Painton & Company, Ltd. v. Bourns, Inc.*, 442 F.2d 216, 225 (2nd Cir. 1971). Since this court has specifically recognized that the immunity Petitioners seek here would lead to waste and misallocation of resources, certiorari is not necessary.

The second policy consideration against preemption is the states' need to maintain decent standards of conduct in the marketplace. In the present case, Petitioners conspired to take proprietary information in breach of a fiduciary

duty; they then used this information for their own benefit. This Court has recognized the importance of allowing state courts to prevent this type of activity. *Kenawee Oil Co. v. Bicron Corporation, supra,* 416 U.S. at 488; *Winston Research Corp. v. Minnesota Mining and Manufacturing Co.,* 350 F.2d 134, 138 (9th Cir. 1965) ("[R]estrictions upon an employee's disclosure of information which was developed as a result of the employer's initiative and investment, and which was entrusted to the employee in confidence, are necessary to the maintenance of decent standards of morality in the business community.")

Based on these strong policy considerations, both this Court and the Circuit Courts have refused to apply preemption to state laws which prohibit obtaining confidential information through breaches of fiduciary duties. Since the decision of the Superior Court in the present case is in line with these authorities, certiorari is not warranted.

IV.

THE LANGUAGE IN THE HOUSE REPORT SPECIFICALLY PRECLUDES PREEMPTION IN CASES SUCH AS THIS ONE.

In their final argument, Petitioners note that the House Report, quoted above, provides that the Copyright Act preempts the "tort known as 'interference with contractual relations' to the extent it is equivalent to copyright" (Petition, p.17), but does not preempt actions for breach of trust or confidentiality. Petitioners claim that in light of these two examples, clarification is needed as to which claims will be preempted. Petitioners, however, cite no conflict among cases which would require such clarification. Accordingly, since this supposed ambiguity

has not been fleshed out (or even noticed) by any lower courts, it would be inappropriate for this court to grant certiorari. More importantly, this supposed ambiguity is not relevant in the present case, where the language chosen by the House Committee specifically provides that actions for breach of trust, such as that alleged here, are not preempted.

CONCLUSION

For the reasons stated above, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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